

Collaborating with organized crime in the search for disappeared persons? Formalizing a humanitarian alternative for Mexico

Issa Cristina Hernández Herrera*

Issa Cristina Hernández Herrera holds a master's in transitional justice, human rights and the rule of law from the Geneva Academy for International Humanitarian Law and Human Rights.

Abstract

The search for the more than 90,000 disappeared persons in Mexico has highlighted the need to establish relations of collaboration with organized crime groups in order to access not only relevant information to clarify the fate and whereabouts of the missing, but also territories under the control of organized crime groups for carrying out field searches. Given the ineffectiveness of formal, prosecutorial approaches and the considerable success of grassroots, victim-led search strategies, this paper argues for the need for a broader humanitarian approach to the search for the missing that is victim-centred and complementary to accountability mechanisms. The article advances a proposal to formalize this approach through the International Committee of the Red Cross's (ICRC) involvement in search activities, given the ICRC's unique organizational nature, expertise and humanitarian mandate.

* The author is grateful to Sandra Krähenmann and Ana Srovin Coralli for their vital guidance in drafting this article, and to the interviewees who provided invaluable insight on the realities of the search for disappeared persons. Email: issa.hernandezherrera@geneva-academy.ch.

Keywords: disappearances, humanitarian approach, organized crime, perpetrator collaboration, urban violence.

⋮ ⋮ ⋮ ⋮ ⋮ ⋮

Introduction

From 15 March 1964 to the beginning of August 2021, the official number of disappeared and missing¹ persons in Mexico rose to more than 92,000.² This figure corresponds, to a great extent, to systematic disappearances perpetrated within two main identifiable periods of widespread violence: the “Dirty War” from the late 1960s to the early 1980s, and the “War on Drugs” from 2006 to date.³ While the former was characterized by State-sponsored violence through counter-insurgency tactics used to silence political opposition – notably including enforced disappearances⁴ – the current period is distinguished by generalized violence and disappearances perpetrated by a plethora of State⁵ and non-State actors, namely organized crime groups,⁶ sometimes in collusion with one another.⁷ This situation has prompted a wide range of joint efforts from different

- 1 Following the terminology used by Mexican legislation, a missing person is one whose absence cannot be linked to the commission of a crime, whereas a disappeared person is one whose absence is effectively presumed to be related with a crime. See Mexico, General Law on Forced Disappearance of Persons, 16 November 2017 (GLD), Art. 4(XV–XVI), available at: <https://tinyurl.com/nd8hdjme> (all internet references were accessed in October 2021).
- 2 The Mexican National Search Commission regularly updates the number of missing and disappeared persons. See: <https://versionpublicarmpdno.segob.gob.mx/Dashboard/ContextoGeneral>.
- 3 Ana Srovin Coralli, *Coordination between the Search and Criminal Investigations concerning Disappeared Persons: Case Studies on Bosnia and Herzegovina and Mexico*, Swisspeace, Basel, 2021, pp. 40–41. Out of the total number of disappeared persons, an estimate of 70% correspond to the “War on Drugs” period. See Pablo Ferri, “México eleva la cifra de desaparecidos de la Guerra al narco a más de 60.000”, *El País*, 7 January 2020, available at: https://elpais.com/internacional/2020/01/07/mexico/1578423047_621821.html.
- 4 Jorge Mendoza García, “Reconstruyendo la guerra sucia en México: Del olvido social a la memoria colectiva”, *Revista Electrónica de Psicología Política*, Vol. 5, No. 15, 2007, p. 10.
- 5 For a context overview, see Inter-American Commission on Human Rights, *The Human Rights Situation in Mexico*, 31 December 2015, pp. 63–96. For a particular example of State-perpetrated disappearances within the context of militarization of public security as part of the strategy against the “War on Drugs”, see Inter-American Court of Human Rights, *Alvarado Espinoza et al. v. Mexico*, Series C, No 370, Judgment, 28 November 2018, available at: www.corteidh.or.cr/docs/casos/articulos/seriec_370_ing.pdf.
- 6 Lene Guercke, “State Responsibility for a Failure to Prevent Violations of the Right to Life by Organised Criminal Groups: Disappearances in Mexico”, *Human Rights Law Review*, Vol. 22, No. 2, 2021. While the followed definition of organized crime groups is that of the United Nations Convention against Transnational Organized Crime, it has been object to continuous controversy: see Pierre Hauck and Sven Peterke, “Organized Crime and Gang Violence in National and International Law”, *International Review of the Red Cross*, Vol. 92, No. 878, 2010.
- 7 “At the same time, there are instances where State forces clearly work for or with criminal organisations or manifestly fail to intervene in the commission of atrocious acts. Such collusion indicates that it is often not possible to distinguish between ‘crime’ and ‘State’ in the Mexican context.” L. Guercke, above note 6, p. 346.

stakeholders, such as victims,⁸ the Mexican government, non-governmental organizations (NGOs) and international institutions, to address what is considered a crisis amidst decades of violence.

Landmark achievements have been made to address disappearances, such as enacting the General Law on Forced Disappearance of Persons (General Law on Disappearances, GLD) in 2017, which entailed a comprehensive criminalization of enforced disappearances and disappearances perpetrated by individuals.⁹ Particularly, the GLD introduced a new understanding of the search for disappeared persons as a separate but fundamental pillar for addressing disappearances, parallel to criminal investigations,¹⁰ via the creation of National and Local Search Commissions.¹¹ Despite these efforts, the challenge of accounting for thousands of disappeared persons remains high.¹² Particularly, even with the GLD and its revitalized search framework set in place, information that can effectively lead to clarifying the fate and whereabouts of the disappeared, and from which search strategies and plans can be established, may be elusive and difficult to obtain for authorities.

Relevant information for search purposes, defined as that which is required for clarifying the fate and whereabouts of disappeared persons, includes *ante mortem* data, the circumstances of the disappearance, names of witnesses and perpetrators, and *post mortem* data, such as identified bodies and locations of graves.¹³ However, in reality this information is only scarcely available to authorities in some cases and, even when it is available, it might not be sufficient

- 8 The definition of “victims” followed by this paper includes both disappeared persons and their families, inasmuch as both the International Convention for the Protection of All Persons from Enforced Disappearances, Article 24(1), and Mexican legislation recognize broad definitions of victimhood. See General Victims Law, Mexico, 2013, Arts 2, 4.
- 9 While enforced disappearances are understood as per the International Convention for the Protection of All Persons from Enforced Disappearance, including the distinct characteristic of State involvement, disappearances perpetrated by individuals are defined as “the deprivation of liberty of a person with the aim of hiding the victim or his or her fate or whereabouts”, with no participation of the State whatsoever. GLD, above note 1, Arts 27, 34 (author’s translation). For this paper, the term “disappearance” will be used to encompass both conducts, only differentiating between them when necessary.
- 10 Before the GLD, criminal investigations and searches for disappeared persons were tasked to the same institution, namely the prosecutors’ offices. After consultation with victims, civil society and State institutions, the GLD introduced the revolutionary change of partially separating the search and the criminal investigations into two different processes, therefore entrusting them to different institutions: the search is predominately dealt with by the Search Commissions, while the criminal investigation is retained by prosecutors’ offices. A. Srovin Coralli, above note 3, p. 50. However, it is important to note that Search Commissions are not the only authorities that search, as prosecutor’s offices are also required and allowed to carry out certain acts of search according to the GLD. See, for example, GLD, above note 1, Art. 70(VII–VIII), 70(XVIII).
- 11 Both National and Local Search Commissions are governmental authorities exclusively tasked with the obligation of searching for disappeared and missing persons. GLD, above note 1, Art. 50.
- 12 For example, three years after the creation of the National Search Commission, a grand total of only 396 people –less than 1% of the total number of disappeared persons– have been found by this authority. Secretaría de Gobernación, Request for Access to Public Information No. S.I. 0401600014521, 23 August 2021 (on file with author).
- 13 Monique Crettol, Lina Milner, Anne-Marie La Rosa and Jill Stockwell, “Establishing Mechanisms to Clarify the Fate and Whereabouts of Missing Persons: A Proposed Humanitarian Approach”, *International Review of the Red Cross*, Vol. 99, No. 905, 2017, p. 611.

to find the disappeared person or persons in question. While collaboration¹⁴ with people who possess relevant information is fundamental for a successful search process, it is not unusual for people to abstain from sharing such information out of fear of reprisals or criminal prosecution.¹⁵

Whereas collaboration aimed at acquiring relevant information can be established with various actors under different regimes, such as witness protection or family and victim participation, this paper will focus exclusively on collaboration with organized crime groups.¹⁶ Members of these groups usually have valuable inputs for search purposes, either because they are perpetrators of disappearances or because they possess privileged information due to their involvement in organized crime structures and their territorial control in certain areas. Besides the growing recognition of the role of organized crime groups as perpetrators of disappearances,¹⁷ organized crime groups have become key actors behind the specific phenomenon of disappeared migrants in Mexico, a problem of transnational dimensions and specific challenges that has called for the adoption of concrete legal and humanitarian responses.¹⁸ Moreover, attesting to the importance of the information that these groups possess, there are publicly known examples of search endeavours that were only successful after some type of tip-off was received from organized crime groups or some channel of communication was established with such groups, as will be explored later in this paper.

Given that collaboration with organized crime groups in search activities in Mexico is still a rather under-researched phenomenon, this paper first describes how these relationships take place. In general, it can be said that both formal and informal methods of collaboration have been put into practice, the former led by the criminal law framework for prosecution of crimes, and the latter led by families of the disappeared and victims' groups. This paper's analysis shows that the current legal framework relies too heavily on the prosecutorial approach to search activities, failing to accommodate victims' needs for effective collaboration

14 The term "collaboration" must not be understood as furthering a criminal activity, but as a legal term – found in several legislations, particularly across Latin America – that refers to cooperation between perpetrators (alleged or otherwise) of a crime, particularly organized crime members, and authorities, for truth and/or justice purposes. This term is sometimes referred to jointly as *colaboración eficaz*, "effective collaboration", although it varies from country to country. For an overview of collaboration regimes in Mexico, Brazil and Peru, see Idheas, *Estudio introductorio sobre la figura de beneficios por colaboración*, Mexico, 20 July 2020, available at: <https://tinyurl.com/9d3mjts>.

15 M. Crettol *et al.*, above note 13, p. 592.

16 Notably, this article will not deal with State-perpetrated disappearances, without prejudice to the need to take them into account and to explore alternatives to establish effective measures to facilitate information-sharing and other forms of collaboration by State-related perpetrators or witnesses.

17 In Mexico, this recognition is evidenced by the GLD's criminalization of "disappearances perpetrated by individuals", where no State involvement is needed to commit said crime. This is an attempt to deal not only with the growing involvement of non-State parties in disappearances but also with the overall uncertainty regarding the identity of perpetrators vis-à-vis the frequent impossibility of distinguishing between "crime" and "State". See L. Guercke, above note 6, pp. 346–347.

18 For an extensive analysis of this particular issue, see Gabriella Citroni, "The First Attempts in Mexico and Central America to Address the Phenomenon of Missing and Disappeared Migrants", *International Review of the Red Cross*, Vol. 99, No. 905, 2017.

with organized crime groups. Therefore, this paper argues for the need for a broader humanitarian approach to search endeavours that is victim-centred and complementary to justice-seeking mechanisms, in order to fulfil victims' right to know the fate and whereabouts of their disappeared relatives. Finally, it advances a proposal to operationalize this approach through the involvement of the International Committee of the Red Cross (ICRC) in search activities in Mexico.

Existent practices of collaboration in the search for the disappeared in Mexico

Formal methods: The prosecutorial approach of benefits for efficient collaboration

The Mexican criminal legal framework offers benefits, under the criminal law system, for perpetrators who collaborate with the investigation and prosecution of certain crimes, as well as for those who contribute to locating victims.¹⁹ Specifically, the GLD allows varying degrees of reduced sentencing for perpetrators if the information they provide effectively leads authorities to the whereabouts of the person they are being accused of disappearing, or if they share information that clarifies the fate of the missing and aids in identifying those responsible.²⁰

However, the fact that collaboration benefits are ruled by the criminal law framework entails serious limitations. Firstly, for reduced sentencing to be applicable, the perpetrator must have been identified and detained, and must have been prosecuted or sentenced for the crime of enforced disappearance or disappearance perpetrated by individuals. Given that 92.4% of crimes committed in Mexico are either not reported or not investigated by authorities,²¹ there is little to no chance of actually applying any benefits in practice. Moreover, while thousands of disappearance-related investigations remain open, only a grand total of thirty-five convictions have been achieved,²² attesting to overall impunity for disappearances alongside the State's weak prosecutorial capacities.

Secondly, perpetrators can only access reduced sentencing as per the GLD if (1) they are being charged with the crimes of either enforced disappearance or disappearance perpetrated by individuals, and (2) the information they provide relates to the victim or victims that they are being charged with disappearing. Therefore, a person being prosecuted for any crime other than the two listed above cannot access any benefits for their collaboration, even if the information

19 For an introductory overview of the benefits legal regime, see Idheas, above note 14.

20 GLD, above note 1, Art. 33(II-IV).

21 National Institute of Statistics and Geography, "National Survey on Victimization and Perception of Public Safety", Press Release No. 636/20, Mexico, 10 December 2020, p. 12, available at: www.inegi.org.mx/contenidos/saladeprensa/boletines/2020/EstSegPub/envipe2020.pdf.

22 Karla I. Quintana Osuna, "Hacia una reforma integral de justicia", *Animal Político*, 14 December 2020, available at: www.animalpolitico.com/blog-invitado/hacia-una-reforma-integral-de-justicia/.

they share is relevant to disappearance-related cases, or if they are charged with other disappearance-related crimes.²³ The results of this narrow applicability have been evident: up to May 2020, the Federal Prosecutor's Office reported no record of ever using any of the benefits provided by the GLD.²⁴

Thirdly, since the benefits of collaboration apply exclusively within the criminal law framework, the Search Commissions have no faculties of participation or interference in these processes.²⁵ This is a crucial shortcoming to recognize: the main authority responsible for the search for disappeared persons cannot participate in the only available legal process to access relevant information for search purposes, and cannot offer any benefits to collaborative perpetrators.²⁶

Therefore, the design of the benefits for collaboration provided by the law has been considered insufficient by government and civil society alike, not only because of their rather limited applicability but also due to the current prosecutorial practices of the State. An example of this is the paradigmatic case of the forty-three disappeared students of Ayotzinapa, Guerrero, in September 2014. While presumed perpetrators have been detained, the students' families and representatives have stated that there is no use in prosecuting the perpetrators if the State cannot get from them relevant information to locate their loved ones.²⁷ Implicitly recognizing the existing legal framework's constraints and seeing the need for a new regulation, President Andrés Manuel López Obrador created, by presidential decree, the Commission for Truth and Access to Justice for the Case of Ayotzinapa in 2018. In the decree, the secretary of government was given the mandate to design a new, *ad hoc* mechanism for collaborating with perpetrators and witnesses who might possess substantial information on the case.²⁸ While this mechanism is yet to be created, it testifies to the federal government's initial recognition of the need to access relevant information for search purposes, and the incapability of the current framework for fostering collaboration relations with perpetrators. Additionally, a year after the aforementioned decree, President López Obrador included a specific commitment to further the benefits for effective collaboration regime within the framework of implementation of the GLD,²⁹ although concrete proposals or changes in this regard are also pending.

23 The GLD recognizes certain conducts as crimes related to disappearances – such as hiding or destroying a victim's remains – even if the perpetrator did not take part in the abduction *per se*. GLD, above note 1, Art. 37.

24 Fiscalía General de la República, Request for Access to Public Information No. 00017000151521, 24 May 2020 (on file with author).

25 Comisión Nacional de Búsqueda, *Insumos para beneficios por colaboración eficaz*, 2020 (internal document, on file with author).

26 A. Srovin Coralli, above note 3, p. 69.

27 Mariana Cervantes, "Detenidos por caso Ayotzinapa colaboran a cambio de beneficios legales", *RadioFórmula*, 20 July 2020, available at: www.radioformula.com.mx/noticias/20200710/vidulfo-rosales-testigos-caso-ayotzinapa-43-normalistas-ultimas-noticias-2020/.

28 Presidencia de la República, *Decreto por el que se instruye establecer condiciones materiales, jurídicas y humanas efectivas, para fortalecer los derechos humanos de los familiares de las víctimas del caso Ayotzinapa a la verdad y al acceso a justicia*, Mexico, 4 December 2018, Art. 6.

29 Presidencia de la República, "Presidente López Obrador presenta Plan de Implementación de la Ley General en Materia de Desaparición Forzada de Personas", 4 February 2019, Point 11, available at:

Within civil society, new discussions on creating and operating successful collaboration schemes have been held by different stakeholders and families of the disappeared. For example, in 2019 a federal senator hosted a small, informal seminar with representatives of NGOs, prosecutors, judges and defence lawyers to discuss the possibility of reforming the benefits regime. While participants recognized the impracticability and disuse of the current benefits framework, the highly technical question of how a new system of benefits could best be implemented was left unanswered.³⁰

Informal methods: The open secret of citizen-led searches

Informal methods of collaboration take place within what has been called *búsqueda ciudadana* (search by citizens, or citizen-led searches), as opposed to State-led searches for the disappeared. The phenomenon of victims' groups and families conducting searches independently from State authorities has been documented in various places in Latin America,³¹ as well as in Spain.³² Particularly, Mexico and Colombia have witnessed that "in the face of political and scientific regimes ruled by impunity and normalized violence, [relatives of disappeared persons] create new forms of civism around forensic knowledge".³³ In Mexico, as forensic science is under a crisis of credibility and capacity³⁴ highlighted by impunity, governmental corruption and indifference, and lack of political will, relatives of the disappeared are indirectly forced to start searching for their loved ones by their own means, putting themselves at risk:³⁵ "Their situation is characterized by values of a certain liberal self-governance such as prudentialism (managing one's own actions to avoid getting killed) and self-improvement (learning about law, forensic science and narcopolitics) to navigate uncertainty."³⁶

www.gob.mx/presidencia/prensa/presidente-lopez-obrador-presenta-plan-de-implementacion-de-la-ley-general-en-materia-de-desaparicion-forzada-de-personas.

30 Idheas, *Relatoría del conversatorio "Beneficios por colaboración"*, Mexico, 14 May 2019.

31 Ernesto Schwartz-Marin and Arelly Cruz-Santiago, "Pure Corpses, Dangerous Citizens: Transgressing the Boundaries between Mourners and Experts in the Search for the Disappeared in Mexico", *Social Research: An International Quarterly*, Vol. 83, No. 2, 2016, p. 486.

32 Francisco Ferrándiz, "Exhuming the Defeated: Civil War Mass Graves in 21st-Century Spain", *Journal of the American Ethnological Society*, Vol. 40, No. 1, 2013.

33 Ernesto Schwartz-Martin and Arelly Cruz-Santiago, "Forensic Civism: Articulating Science, DNA and Kinship in Contemporary Mexico and Colombia", *Human Remains and Violence*, Vol. 2, No. 1, 2016, pp. 58–59.

34 Due to the general context of violence alongside limited forensic capacities in Mexico, there are approximately 50,000 human remains pending forensic identification. Therefore, families of disappeared persons and victims' groups advocated for the creation of an Extraordinary Forensic Identification Mechanism, accepted by the Mexican federal government in early 2020. See Movimiento por Nuestros Desaparecidos México, "MNDM: Más de 50,000 personas fallecidas sin identificar en los servicios forenses del país", 10 December 2020, available at: <https://movndmx.org/wp-content/uploads/2020/12/Comunicado-MNDM-10-diciembre-2020.pdf>; Secretaría de Gobernación, *Acuerdo SNBP/001/2019 por el que se aprueba la creación del Mecanismo Extraordinario de Identificación Forense*, Mexico, 19 March 2020.

35 E. Schwartz-Martin and A. Cruz-Santiago, above note 33, p. 59.

36 *Ibid.*, p. 59.

Within citizen-led searches, relationships of collaboration between families and organized crime have been created, and while these are mostly undocumented, they constitute an open secret – “everyone who works with victims knows that everyday information on localization of mass graves is obtained and that those who provide said location data are people who participated in the events”.³⁷ Through this understanding of citizen-led searches, three main types of organized crime–victim collaboration can be identified: victim-initiated communication, organized crime-initiated communication, and organized crime cooperation for field searches.

Victim-initiated communication

It is not uncommon for families of the disappeared to approach organized crime group members, on their own initiative and at their own expense, in order to get any type of relevant information they can obtain.³⁸ For example, during an interview, one family member stated:

They are easy to find; everyone knows who the local kingpins are. Therefore, I have requested meetings with them quite a few times and asked them to give me information that can help me locate my relatives. That is all I ask of them. I tell them that I do not want to harm them or put them in jail, just their information.³⁹

However, these endeavours entail serious risks. As the same interviewee explained: “I do not do that anymore. One day they came to my home and kidnapped me in front of my family. ... I managed to escape. I am still scared.”⁴⁰ In general, it is important to recognize that victim-led searches are accompanied by significant safety threats. From 2010 to date, at least twelve murders of victim-searchers have been recorded, and these individuals’ activism and search-related work is strongly suspected to be the reason behind their homicides.⁴¹

The phenomenon of individual family members searching on their own has steadily evolved into highly organized and professionalized victims’ groups that search at the community, regional and even national levels. Of particular interest is the extent to which these grassroots initiatives have expanded and organized in Mexico through the ambitious National Search Brigades, dating back to 2016 and still operating, where groups of families, NGOs, religious leaders and communities come together not only for search activities but also for legal counselling, healing of social fabric and sensitivity training, among others.⁴² The

37 Idheas, above note 30, p. 13 (author’s translation).

38 E. Schwartz-Martin and A. Cruz-Santiago, above note 33, p. 67.

39 Anonymous interview with relative of disappeared persons, Mexico, March 2021 (on file with author).

40 *Ibid.*

41 Analy Nuño, “Buscaban a un familiar desaparecido; fueron asesinados”, *A Dónde Van los Desaparecidos*, 4 August 2020, available at: <https://adondevanlosdesaparecidos.org/2021/08/04/buscaban-a-un-familiar-desaparecido-fueron-asesinados/>.

42 Álvaro Martos and Elena Jaloma Cruz, “Desenterrando el dolor propio: Las Brigadas Nacionales de Búsqueda de Personas Desaparecidas en México”, in Javier Yankelevich (ed.), *Desde y frente al Estado:*

Brigade organizers employ what they call a “humanitarian approach”, a logic of exclusive interest in finding the disappeared and not in prosecutions, consisting of establishing dialogues with low-rank State authorities and community members with the aim of raising awareness of the harms caused by the disappearances.⁴³ The targeted groups for these workshops are people who have established communication channels with organized crime groups and could thus eventually provide information on the fate and whereabouts of the disappeared. The Brigades’ working group on humanitarian sensitization, for example, sets up a “mailbox of peace” during its workshops in schools, churches and other public spaces, where people can leave messages to the families and victims:⁴⁴ “This has given us an ample diversity of messages that go from letters of support to even information for the searches, which we then use, always respecting the anonymity [of the information provider].”⁴⁵

Organized crime-initiated communication

The humanitarian dialogues and sensitization strategies employed by the National Search Brigades have yielded valuable results, leading to the second type of collaboration: organized crime groups have approached victims, on their own initiative, to share relevant information on the disappeared. As recounted in an interview with a Brigade participant,⁴⁶ the following two examples of this collaboration scheme can be offered. Firstly, after the inaugural religious service of the First National Search Brigade, a crying man approached the staff saying that, until that day, he had not realized the pain he had caused; he stated that he did not participate directly but was involved in disappearance-related crimes, and provided the information he had on the matter. Secondly, during the Third National Search Brigade, a perpetrator gave information on the grave and identity of one of his victims, asking in return for the Brigade organizers to search for his own disappeared brother.

Perpetrators and organized crime groups have approached victim-searchers even outside the concerted humanitarian strategies highlighted above. Besides the National Search Brigade framework, the most documented case of organized crime collaboration is that of Colinas de Santa Fe. On 10 May 2016, when Mexico celebrates National Mother’s Day, two men gave the mothers of Colectivo Solecito, a victims’ group, a map that pinpointed the location of Colinas de Santa Fe, north of the port of the state of Veracruz. Taking what was called by the local press “the macabre gift”, the group decided to search the

Pensar, atender y resistir la desaparición de personas en México, Centro de Estudios Constitucionales de la Suprema Corte de Justicia de la Nación, Mexico, 2017, pp. 103–114.

43 Brigada Solidaria NYC, “Info Sessions: National Search Brigade, Part Two”, 23 April 2021, available at: www.youtube.com/watch?v=KUM5j9TFVG4&t=5s&ab_channel=BrigadaSolidariaNYC.

44 Brigada Solidaria NYC, “Mother’s Day Call”, 5 May 2021, available at: www.youtube.com/watch?v=y0jhJ2fQL1A&ab_channel=BrigadaSolidariaNYC.

45 Anonymous interview with Brigade organizer 1, Mexico, May 2021 (on file with author).

46 Anonymous interview with Brigade organizer 2, Mexico, March 2021 (on file with author).

ten-hectare land and found Latin America's biggest mass grave to date, with 298 bodies and more than 22,000 bone remains.⁴⁷ Another critical example of information-sharing took place in Tijuana, where anonymous and very precise messages detailing the location of mass graves were sent to the father of a disappeared boy. This led to the discovery in 2009 of a site in Ojo de Agua, an area bordering the United States, in which bodies had been chemically dissolved and buried, leaving them impossible to forensically identify. After this discovery, a former bricklayer was detained and confessed to having "taken care of" approximately 300 bodies as part of his job for the Sinaloa Cartel.⁴⁸ A third case was recorded in Nayarit, where an anonymous informant told the father of a disappeared person that they had "precise information of about 20 clandestine graves ordered by officers of Nayarit's Prosecutor's Office, including the Nayarit Police".⁴⁹ This information led the victims' group Colectivo Familias Unidas por Nayarit to search for and find a total of thirty-three bodies in three different clandestine graves in January 2018.⁵⁰

Admittedly, there have also been instances of anonymous communications claiming to have relevant information about the fate and whereabouts of disappeared persons that have turned out to be false, or even used against the families in (sometimes successful) attempts at extortion.⁵¹ Other times, perpetrator-initiated communication has been made while demanding ransoms, or has even tragically ended with the disappearance and eventual homicide of hopeful relatives after meeting up with people who promise information.⁵² Therefore, while there are examples of fruitful perpetrator-initiated communication, there are also numerous unsuccessful instances that have led to crimes against and further victimization of the families of disappeared persons. Here again, the issue of safety is pre-eminent, highlighting the need for an alternative that continues to allow citizen-led searches while reducing the inherent risks of such activities.

Organized crime cooperation for field searches

The third type of collaboration relates not to information-sharing *per se* but to removing obstacles to search efforts. On some occasions, victim-searchers are granted permission to access territories under the *de facto* control of organized

47 Rubén Martín, "Colinas de Santa Fe: Barbarie y resistencia en México", *Sin Embargo*, 18 August 2019, available at: www.sinembargo.mx/18-08-2019/3630804.

48 Alberto Nájjar, "México: El hombre que disolvió en ácido a 300 personas", *BBC News*, 22 August 2014, available at: www.bbc.com/mundo/noticias/2014/08/140821_mexico_desaparecidos_pozolero_an.

49 Idheas, *Verdad a voces: La pesadilla nayarita continúa*, Mexico, 10 December 2020, p. 10 (author's translation), available at: www.idheas.org.mx/wp-content/uploads/2020/12/Gaceta_DIGITAL.pdf.

50 *Ibid.*, p. 11.

51 Universidad Iberoamericana, *Manual de acciones frente a la desaparición y la desaparición forzada: Orientaciones para las familias mexicanas de personas desaparecidas*, Mexico, 2019, pp. 18, 22, 94.

52 See, for example, the case of Pablo Miramontes Vargas, one of twelve family-searchers murdered in connection with their search endeavours. Miramontes Vargas was searching for his disappeared brother, César Alejandro. A. Nuño, above note 41.

crime groups and are even given their protection during the search. Stemming from the fact that a considerable part of the Mexican territory is either directly or indirectly controlled by different organized crime groups,⁵³ searches for the disappeared encounter the additional obstacle of processing fields under the command of such groups. Most of the examples given so far have taken place on the former lands and properties of organized crime groups, either abandoned or retaken by the Mexican State. Nevertheless, it is unclear to what extent search plans have been halted or affected due to the inability of both victim and State searchers to access identified mass graves. The fact that citizen-led searches have higher possibilities of gaining said access, made possible thanks to the humanitarian discourse surrounding grassroots search activities, is remarkable: “There are zones which neither the police nor the army can enter, but they let the [National Search] Brigade in.”⁵⁴

Evaluating current needs for fostering collaboration with organized crime

As seen so far, the pressing need for information on the disappeared and the fact that the law does not provide mechanisms for effective collaboration with organized crime groups have generated practices that entail severe risks to families, people who conduct searches, and even collaborative members of organized crime groups. Furthermore, the limited options available for collaboration result in a failure to accommodate the needs of the families of the disappeared and to take advantage of the willingness to cooperate that organized crime groups have shown.

In particular, the fact that organized crime groups have responded positively to humanitarian proposals in various cases, and have even replicated this approach unilaterally, disrupts assumptions about perpetrator cooperation. The idea that perpetrators are unlikely to come forward willingly and that revealing the truth is never in their interest,⁵⁵ although true in some contexts, proves to be insufficiently nuanced when looking more closely at practice. The logic of the “carrot and stick”, consisting of approaching perpetrators with either threats of prosecution or rewards for their cooperation (amnesties being the most popular example of the latter), might not be the only motivation for perpetrators to share information. For instance, besides the examples given so far related to Mexico, another precedent lies with the work done by the Truth and Reconciliation Commission for Sierra Leone. While it lacked the power to grant amnesty to perpetrators that came forward, and could not guarantee, either, that

53 The US government maintains that 30–35% of Mexican territory consists of ungoverned areas. US Department of Defense, “USNORTHCOM-USSOUTHCOM Joint Press Briefing Transcript”, 16 March 2021, available at: www.defense.gov/Newsroom/Transcripts/Transcript/Article/2539561/usnorthcom-ussouthcom-joint-press-briefing/.

54 Anonymous interview with Brigade organizer 1, above note 45.

55 Isabelle Lassée, “The Sri Lankan Office on Missing Persons: Truth and Justice in Tandem?”, *International Review of the Red Cross*, Vol. 99, No. 905, 2017, p. 625.

the Special Court for Sierra Leone would not use their testimonies in eventual criminal proceedings,

[i]t is a fact ... that many perpetrators did come forward and cooperate with the Commission and this despite either the absence of a carrot or the presence of a stick. The willingness or reluctance of perpetrators to participate ... may have far less to do with promises of amnesty or threats of prosecution than many think.⁵⁶

It cannot be denied that some perpetrators, especially those already serving sentences, and persons deprived of their liberty who possess information relevant to the search for the disappeared, may indeed only be willing to collaborate if reduced sentencing or some other benefit can be offered to them. However, examples like these invite us to think about the possibility of seeing perpetrator collaboration under a broader perspective. As social actors are not defined by a single identity but represent a complex mix of cognitive structures,⁵⁷ further aspects that shape their world views ought to enter into our analysis. An important example of these missing aspects is religion, which “can often act as an independent motivating force in politics by functioning as the lens through which actors understand the world and their role there-in”.⁵⁸ For a more in-depth analysis of perpetrator motives and incentives for collaboration with truth-seeking or even accountability mechanisms, scholarship must contest frozen identities and go beyond exclusive legal understandings of the social actors involved. As perpetrators—and organized crime groups, for that matter—are neither homogenous groups nor exclusive categories,⁵⁹ different strategies for enhancing collaboration, beyond the “carrot and stick” logic of legal proceedings, should be put in place.

For this purpose, the humanitarian approach in the search for the disappeared offers an alternative for new collaboration strategies. Indeed, what the typologies of informal practices have in common is an underlying logic of humanitarianism, either implicit or explicit, from which a discourse of confidentiality, and even mercy—sometimes with clear religious undertones—in alleviating victims’ suffering, is built. Citizen-led searches in Mexico have been pushed towards creating their own understandings and practices of a humanitarian approach: to be a humanitarian and to sideline—though without forgetting—the fight for justice has been, for some, the best option for getting answers and for owning processes of truth from the grassroots.

56 William A. Schabas, “Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court”, *Journal of International Criminal Justice*, Vol. 2, No. 4, 2004, p. 303.

57 Sabina A. Stein, “Competing Political Science Perspectives on the Role of Religion in Conflict”, *Politorbis*, No. 52-2, 2011, p. 24.

58 *Ibid.*, p. 25.

59 It has been widely recognized that perpetrators can be, and not uncommonly are, victims too. See, for example, Primo Levi, “The Grey Zone”, in P. Levi, *The Drowned and the Saved*, Abacus, London, 2013.

Pathways towards a broader humanitarian understanding

Recently, more comprehensive understandings of what a humanitarian approach to the search for disappeared and missing people entails have been developed in international fora. For example, Monique Crettol, Lina Milner, Anne-Marie La Rosa and Jill Stockwell argue in favour of a humanitarian approach, constructed as one which does not inquire as to who is responsible for the disappearance and properly manages confidential information as a key instrument for obtaining information from reluctant witnesses and perpetrators.⁶⁰ These authors highlight the use of confidentiality and even anonymization of data as part of a protective framework to incentivize the collaboration that is needed to account for missing persons.⁶¹ Vishakha Wijenayake is another author who has recently recalled the importance of humanitarian mandates in the context of the search for the disappeared, understanding the humanitarian approach as not only juxtaposed to the accountability approach but also complementary to it.⁶² She stresses that even though police and prosecutorial investigators are effective in gathering sensitive information, they can also be unresponsive to victims' needs, and furthermore, that families' goals may go beyond accountability, and thus spaces for truth-seeking should be provided through more than just criminal justice means.⁶³

In Mexico, both the GLD and the Homologated Search Protocol⁶⁴ claim to operate under a humanitarian principle, defined as actions focused on alleviating the suffering and uncertainty of the families of disappeared persons.⁶⁵ While broad enough to include a wide range of measures, this definition does not allude to the expanded humanitarian approach delineated above—namely, one that is separated from justice-oriented mechanisms (albeit not undisputedly so⁶⁶) and based on confidentiality. Therefore, the current search framework makes no explicit mention of or distinction between these two approaches.

Even though complementarity between the prosecution and truth-seeking logics was intended by the GLD,⁶⁷ the search framework set in place finds itself too immersed in the accountability logic and would thus be inconsistent with the expanded humanitarian approach proposed above. First and foremost, there is a general obligation for persons who have knowledge of an event that may constitute a crime to report it to the competent investigative authorities; notably,

60 M. Crettol *et al.*, above note 13, pp. 592, 602–603.

61 *Ibid.*, pp. 612–613.

62 Vishakha Wijenayake, “The Office on Missing Persons in Sri Lanka: The Importance of a Primarily Humanitarian Mandate”, *International Review of the Red Cross*, Vol. 99, No. 950, 2017, p. 650.

63 *Ibid.*, pp. 659–660.

64 The Homologated Search Protocol is a policy by the National Search Commission that establishes search procedures and processes, best practices and standards, and terms of coordination with prosecutorial authorities.

65 GLD, above note 1, Art. 5(IV); Homologated Search Protocol, Mexico, 2020, para. 35.

66 See, for example, the historically different understandings of what a humanitarian approach is and its consequences on forensic action between the ICRC and Argentine Forensic Anthropology Team. Adam Rosenblatt, “The Danger of a Single Story about Forensic Humanitarianism”, *Journal of Forensic and Legal Medicine*, No. 61, 2018, p. 76.

67 A. Srovin Coralli, above note 3, pp. 50–51.

this obligation is reinforced when the person in question is a public servant who acquired said knowledge within the exercise of their public functions,⁶⁸ including authorities tasked with search activities. Moreover, not only is the National Search Commission under an obligation to collaborate, share information and maintain constant communication with crime investigation authorities in matters regarding disappeared persons⁶⁹, but it also has limited powers and therefore ought to collaborate with investigative authorities for certain search activities.⁷⁰ These provisions translate into an inability on the part of national authorities to communicate with organized crime groups in a confidential manner, or to build collaborative relationships free from prosecutorial threats or pretences. Authorities in charge of the search for disappeared persons are thus unable to work under an expanded humanitarian approach that can act independently from prosecutorial logic. Ultimately, the absence of a balance between the humanitarian and the accountability mandates has proven prejudicial for establishing collaboration with organized crime groups: systematically, the criminal law framework has been unable to establish collaboration, to yield results, or even to be practicable for prosecutors. This imbalance makes the legal framework for searches more of an impediment than a helpful tool for gathering information and communicating with organized crime groups.

Nevertheless, it is key to recognize that it is no coincidence that the search system is merged with accountability provisions and thus presents an uneven framework. In drafting the GLD, families lobbied for and worked towards a law that could effectively counter day-to-day impunity and force indifferent authorities to perform their duties.⁷¹ Therefore, even the establishment of reduced sentencing in the GLD was met with scepticism and controversy, as some victims perceived that benefits for perpetrator collaboration were an inappropriate reward, while others recognized their essentiality.⁷²

Certainly, the criminal and the humanitarian approaches have been falsely dichotomized before, presenting victims with a false and unfair choice between justice and truth.⁷³ These experiences have highlighted the necessity of clearly defining what a humanitarian approach entails for the purposes of searching for the disappeared, from a positive (i.e., its constitutive elements, its essentiality) rather than a negative (what it is not, such as an “absence of criminal prosecutions”) conceptual construction. This strategy could be helpful to refute

68 National Code of Criminal Procedures, Mexico, 2014, Art. 222.

69 GLD, above note 1, Art. 53 (XX–XXIII), 53(XL); Homologated Search Protocol, above note 65, paras 292–296.

70 For example, when a search warrant to enter a property is necessary, when clandestine graves are being processed, for exhumation procedures, and for all forensic-related operations. A. Srovin Coralli, above note 3, p. 67.

71 Anonymous interview with an employee of an international organization, Mexico, March 2021 (on file with author).

72 “Activistas piden analizar beneficios de colaboración para delincuentes”, *La Jornada*, 19 July 2020, available at: www.jornada.com.mx/ultimas/politica/2020/07/19/activistas-piden-analizar-beneficios-por-colaboracion-a-delincuentes-182.html.

73 V. Wijenayake, above note 62, p. 646.

the dichotomy and clear up its misunderstandings, such as the equating of humanitarianism with impunity. Admittedly, some positive interpretations of the humanitarian approach have been given, such as the definition that includes confidentiality as a constitutive element. Nonetheless, positively defining humanitarian mandates by connecting them to a victim-centred approach based on the rights and needs of families would resonate more not only with those families but perhaps even with perpetrators, witnesses and the rest of society at large. With a victim-centred logic, arguments in favour of a humanitarian approach would have less chance of being translated as views against the accountability model in search activities.

Furthermore, the issue at hand is not that of favouring one approach over the other but seeking to ensure that both approaches work under a complementarity logic. Both the Guiding Principles for the Search for Disappeared Persons and the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence have advocated for equal efforts to fulfil both approaches as mutually reinforcing.⁷⁴ The aim, ultimately, is to instate a framework that allows victims' right to – and claims for – truth to be operative, through effective collaboration schemes with perpetrators and organized crime groups, while also accommodating their right to justice.

Formalizing alternatives for effective collaboration with organized crime groups: An opportunity for the ICRC

As seen from the sections above, the Mexican search framework highlights the need for a change and expansion in order to foster effective collaboration with organized crime groups, including convicted perpetrators and persons being tried for crimes unrelated to disappearances. However, while legal reforms may well be in order, the lengthy processes involved and the scepticism – or even opposition – that some victims have towards offering benefits for collaboration within criminal prosecutions would pose several challenges. Additionally, changes at the legal level would still be insufficient to reach free and active organized crime group members who are not detained or facing prosecution, significantly narrowing the required applicability for effective collaboration. Furthermore, reforms would not accommodate the proposed humanitarian approach, inasmuch as virtually all Mexican public officials are bound to the obligation of denouncing crimes and sharing information with investigative authorities, and would thus be unable to offer confidentiality vis-à-vis prosecutions. This aspect also points to the fact that part of the success of the humanitarian approach in citizen-led searches has been precisely because public authorities are not involved; thus, the perception that

74 Committee on Enforced Disappearances, *Guiding Principles for the Search for Disappeared Persons*, UN Doc. CED/C/7, 8 May 2019, Principle 13; Human Rights Council, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, UN Doc. A/HRC/36/50, 21 August 2017, para. 82.

organized crime groups have of the nature of the searches and the searchers bears a substantial weight on their decision to collaborate.

Hence, even if legal reforms took place, an alternative that tackles these gaps would be required. Such an alternative would also need to have the following characteristics:

- operates outside the criminal law framework without undermining it;
- practices confidentiality lawfully;
- facilitates safe collaboration by minimizing the expected risks from engaging with active organized crime groups;
- enables an adequate humanitarian image and perception.

To advance such an alternative, aimed at operationalizing the humanitarian approach to search activities, the ICRC's involvement as a fourth party in search processes (in addition to victim-searchers, Search Commissions, and prosecutor's offices), operating alongside the accountability-led framework, could be key. The following proposal explores the possibility of the ICRC engaging as an intermediary for direct communication between organized crime groups and searchers (families and authorities alike), in order to strengthen the already existing practices of informal collaboration by providing a more institutionalized, security-based approach. The idea of institutionalization, although built around the premise of reaching active organized crime groups and their members, could also apply to persons deprived of their liberty, either under criminal processes or already convicted for crimes, related or not to disappearances. This option could target a broader range of perpetrators that could have relevant information for the search. As pointed out before, perpetrators can have a broader set of information-sharing motives beyond a material *quid pro quo* logic. Therefore, by ensuring the confidentiality and safety of their interventions, even when no legal benefits can be offered for participating in a humanitarian information-sharing process, the existence of this alternative could encourage their participation.

Concretely, by approaching these groups and seeking either their information related to disappeared persons or their consent for searches to be carried out in their controlled territories, the ICRC could work as an initiator and facilitator of communication, as well as a receiver of information. Once in possession of the relevant information, the ICRC could share it with search authorities and victim-searchers, without revealing the source or other details that could be used to identify or prosecute the collaborative witness/perpetrator/informant, in order to uphold a strictly humanitarian mandate.

This proposal is not entirely alien to the ICRC's own agenda of humanitarian action; on the issue of missing persons, in 2003 the 28th International Conference of the Red Cross and Red Crescent delineated the goal of encouraging organized armed groups to resolve the issue of missing persons, assisting families and victims, and participating in prevention strategies.⁷⁵

75 ICRC, "Adoption of the Declaration and Agenda for Humanitarian Action", Geneva, 2003, available at: www.icrc.org/en/doc/resources/documents/resolution/28-international-conference-resolution-1-2003.htm.

Moreover, the ICRC has recognized the issue of missing persons as an integral part of its mandate and as an institutional priority,⁷⁶ centring the humanitarian approach on the needs of affected victims, including the paramount right to know the fate and whereabouts of their loved ones.⁷⁷ Most recently, the ICRC's Missing Persons Project has dedicated one of its four pillars to mechanisms to clarify the fate and whereabouts of the missing, explicitly looking at ways to ensure complementarity with other approaches besides the humanitarian one.⁷⁸ All these policies, relevant to disappeared persons, established the foundation for exploring and expanding the ICRC's work on collaborating with organized crime groups.

It is essential to recognize that the ICRC's potential participation in the Mexican context stands regardless of whether or not Mexico's context of violence can be classified as a non-international armed conflict (NIAC),⁷⁹ as it falls into the category of "other situations of violence" (OSVs). While already working on issues related to disappeared and missing persons in Mexico,⁸⁰ the ICRC has the possibility, through its right of humanitarian initiative,⁸¹ of offering its services by expanding its current activities into actively enabling and fostering collaboration schemes with organized crime groups. Ultimately, to achieve the implementation of its humanitarian activities, the ICRC would have to seek the Mexican State's consent, while remaining clear that this offering does not constitute any sort of interference in the internal affairs of the State, and that the ICRC's further engagement would have no impact with regard to conflict classification or the legal status of perpetrators.⁸²

Therefore, for engaging in OSVs, if a concrete situation of violence has significant humanitarian consequences (with due regard to the nature of these consequences, their severity and their magnitude) and the humanitarian action considered by the ICRC constitutes a relevant response to the identified humanitarian consequences (analyzing the ICRC's identity and nature, and its

76 ICRC, "Q&A: The ICRC's Engagement on the Missing and Their Families", *International Review of the Red Cross*, Vol. 99, No. 905, 2017, p. 539

77 *Ibid.*, p. 540.

78 *Ibid.*, p. 544.

79 The case of Mexico is controversial regarding conflict classification. While some have advocated for the situation in Mexico to be recognized as a NIAC, the Mexican government and the ICRC itself have not classified it as such. For arguments in favour, see, for example, Geneva Academy of International Humanitarian Law and Human Rights, "Non-International Armed Conflicts in Mexico", *RULAC*, available at: www.rulac.org/browse/conflicts/non-international-armed-conflict-in-mexico. For arguments against, see, for example, Diego Ruiz Gayol, "Applying International Humanitarian Law to Apples and Oranges. The Situation of Violence in Mexico: A Non-International Armed Conflict?", July 2020 (unpublished, on file with author).

80 The areas of work include forensics, training, implementation of the GLD, and psychosocial support to victims. ICRC, *Annual Report 2020: Mexico*, 22 April 2020, p. 19.

81 The categorization of a situation as an OSV, below the threshold of armed conflict, can trigger the ICRC's right of humanitarian initiative, grounded in Article 5(3) of the Statutes of the International Red Cross and Red Crescent Movement. See ICRC, "The International Committee of the Red Cross's Role in Situations of Violence Below the Threshold of Armed Conflict: Policy Document", *International Review of the Red Cross*, Vol. 96, No. 893, 2014, pp. 282–287.

82 *Ibid.*, p. 302.

specific competences, resources and expertise, among other factors⁸³), the ICRC's involvement is not only possible but also desirable, and may even be pressing. The arguments for why the ICRC's participation would constitute an ideal response to Mexico's situation regarding disappeared persons – namely, that this situation entails humanitarian consequences to which only the ICRC's organizational nature, work policies and unique expertise can respond – coincide with the ICRC's own criteria for involvement in OSVs, as seen below.

The disappeared and their families: Significant humanitarian consequences

In Mexico, widespread violence related to organized crime since the “War on Drugs” has been considered to have triggered a humanitarian emergency, particularly taking the situation of disappearances as amounting to a humanitarian crisis.⁸⁴ In particular, disappearances, enforced disappearances and issues pertaining to unidentified bodies are among the situations recognized by the ICRC as resulting in humanitarian consequences that seriously affect people and victims outside the classification of armed conflicts.⁸⁵ Furthermore, the ICRC recognizes that its non-exhaustive list of humanitarian consequences stems from violations of international human rights law.⁸⁶ Therefore, given that international jurisprudence is unanimous in considering disappeared persons' families' suffering as a form of ill-treatment or even torture,⁸⁷ their situation entails clear and significant humanitarian consequences.

The ICRC's unique organizational nature and expertise: Key for humanitarian alternatives

The ICRC possesses various qualities that are relevant to the implementation of a humanitarian approach to the issue of disappeared persons in Mexico. Firstly, as an impartial, neutral and independent organization with an exclusively humanitarian mission, the ICRC has a unique nature that can constitute an alternative outside and parallel to the criminal law framework. As the ICRC's approach to disappeared persons remains exclusively focused on the humanitarian imperative of the families' need to know the fate and whereabouts of their disappeared relatives, it does not participate in accountability processes, while still acknowledging families' rights to and demands for justice.⁸⁸ In this regard, the ICRC's practice is to inform victims of the available mechanisms and

83 *Ibid.*, pp. 290–296.

84 Kristin Bergtora Sandvik and Kristian Hoelscher, “The Reframing of the War on Drugs as a ‘Humanitarian Crisis’: Costs, Benefits, and Consequences”, *Latin American Perspectives*, Vol. 44, No. 4, 2017, p. 171.

85 *Ibid.*, pp. 290–291.

86 ICRC, above note 81, p. 291.

87 International Commission of Jurists, “Desaparición forzada y ejecución extrajudicial: Los derechos de los familiares”, in *Guía para Profesionales*, No. 10, Geneva, 2015, p. 14.

88 ICRC, above note 76, p. 540.

opportunities for seeking justice, avoiding undermining their capacity for self-protection and their right to participate in these processes.⁸⁹ As such, the ICRC operates in parallel with accountability mechanisms, and for Mexico, this means that no lengthy reform process or any compromise of the criminal law framework would have to occur to operationalize the proposed humanitarian approach. In turn, this would allow the existing accountability structure to continue its anti-impunity work while the humanitarian approach is truly operationalized, enabling a more symmetrical interaction between the two. As there exists great asymmetry between the two approaches, *prima facie* disregarding the complementarity principle, strengthening the humanitarian approach is imperative if a truer form of mutually reinforced approaches is to be achieved.

Secondly, as the ICRC does not participate or cooperate in accountability processes, it can work on a confidential basis. Indeed, ICRC staff enjoy a general evidentiary privilege, consisting of the privilege of non-disclosure and testimonial immunity, and as such, they cannot be compelled to provide information to investigative authorities or courts.⁹⁰ The reason for this is clear: if the information given to the ICRC under confidentiality clauses “were used in legal proceedings in favour of or against one of the parties to an armed conflict, this would inevitably undermine the perception of – and trust in – the ICRC as truly neutral in that conflict”.⁹¹ Confidentiality as a working method has thus historically allowed the ICRC to establish and maintain effective dialogue with armed non-State actors and to protect its personnel, as security is primarily based on the parties’ recognition of the organization as neutral, impartial and independent.⁹² These evidentiary privileges are completely unique to the ICRC,⁹³ and as such, no other humanitarian organization or even government authority, including the National and Local Search Commissions, could offer the confidentiality guarantees that the ICRC can. Hence, only through the ICRC can those perpetrators and organized crime group members willing to collaborate be ensured – to a certain extent – that the information they give will be used solely for the humanitarian purpose of finding the disappeared. Nevertheless, this guarantee is admittedly limited. While the ICRC can indeed ensure that no personal information of the informant will be shared with searchers, the sole use of said information to search for and find disappeared persons can yield evidence that could, eventually, be used for criminal investigations and procedures.⁹⁴ This aspect illustrates why, by strengthening the humanitarian approach, its accountability counterpart is not *per se* diminished but is actually reinforced – i.e., complementary.

89 V. Wijenayake, above note 62, p. 652.

90 ICRC, “The ICRC’s Privilege of Non-Disclosure of Confidential Information”, *International Review of the Red Cross*, Vol. 97, No. 897–898, 2016, p. 442.

91 *Ibid.*, p. 434.

92 *Ibid.*, pp. 435–436.

93 As recognized by the International Criminal Tribunal for Rwanda (ICTR): see ICTR, *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55, Reasons for the Chamber’s Decision on the Accused’s Motion to Exclude Witness TQ, 15 July 2005, para. 16.

94 For an analysis of the converging of the humanitarian and criminal approaches in the context of Sri Lanka, see I. Lassée, above note 55, pp. 626–629.

Thirdly, the ICRC has a reputable history of humanitarian engagement with armed non-State actors. This work has been deemed a precondition for its safe access to persons and territories affected by OSVs, and as the only way to ensure that these groups understand the neutral, independent and impartial mandate of the organization.⁹⁵ Therefore, as the safety of ICRC beneficiaries and staff is always a pressing concern, the acceptance of this neutral, impartial and independent nature is what allows the ICRC to work with armed groups and could, eventually, permit groundwork with organized crime groups. Safety-wise, this engagement could fill the gap between the current needs of the search for disappeared persons and the current capacities of citizen-led searches. Whereas the latter have developed considerable practical knowledge around communicating, petitioning and collaborating with organized crime groups, security issues continue to be among the most significant concerns when carrying out their activities. The inclusion of the ICRC as a mediator of communication and information-sharing between organized crime groups and victim-searchers could mitigate the risks to both parties. While the latter would not have to expose themselves, organized crime group members willing to collaborate could have the added guarantee that their cooperation would be confidential. Accordingly, confidentiality could lessen the risks of prosecution-related repercussions, as well as repercussions from within organized crime groups' own ranks.

Finally, to approach organized crime groups from a purely humanitarian interest (i.e., finding the disappeared), with confidentiality guarantees, fosters the perception of the ICRC as a neutral, independent and impartial organization. As mentioned before, citizen-led searches have been successful partly because of the image they give to organized crime groups; by not being authorities or rival groups, they can establish dialogues from an exclusively humanitarian standpoint. The ICRC could mirror and strengthen this image, and in turn this perception can function by itself as an incentive for establishing trust and collaboration. Moreover, as the ICRC is positioned as an international organization with no dependence on the Mexican government, it can effectively sidestep the political strife not only between organized crime and the State but also between organized crime groups themselves, and thus be perceived as an external actor with a limited, humanitarian interest.

On the dangers of the “humanitarianization” of organized crime-related violence

As humanitarian organizations have steadily expanded their mandates to include urban settings –along with organized crime and narco-trafficking-related

95 Jelena Pejic, Irénée Herbet and Tilman Rodenhäuser, “ICRC Engagement with Non-State Armed Groups: Why and How”, *Humanitarian Law and Policy Blog*, 4 March 2021, available at: https://blogs.icrc.org/law-and-policy/2021/03/04/icrc-engagement-non-state-armed-groups/?utm_source=linkedin&utm_medium=social&linkId=100000035636190.

violence⁹⁶– the phenomenon of “humanitarianization of urban violence” has encountered a critical series of concerns that warns against the costs of this new framing. Among scholars’ concerns are governments’ avoidance of political responsibility vis-à-vis the impartiality and neutrality of the humanitarian frame, the sidelining of development and redistributive strategies, the depoliticization of international responsibility regarding light arms and narcotics-related violence in Latin America, and the possibility of undermining contentious social movements.⁹⁷ For the ICRC, the costs have been associated with its neutrality, as it has engaged with violence reduction activities by deterring people from joining armed groups, classified armed actors according to their motives, and established dialogues predominately with national authorities but only to a lesser extent with non-State armed groups.⁹⁸

While these concerns are related to the general expansion of the humanitarian field and are thus not specific to the present proposal of expanding ICRC activities for disappeared persons, they are still pertinent cautions moving forward. The concepts of complementarity and a victim-centred approach already delineated in this paper are vital for addressing them. The expansion of the humanitarian approach with the sole aim of fostering collaboration with organized crime groups for disappearance-related issues is a very targeted proposal of humanitarianization, based on victims’ needs, and therefore does not necessarily entail a depoliticization of the overall context of violence. As the inclusion of a humanitarian approach seeks to work as an added value, complementary with all other existent structures and policies put in place, it would not entail a superposition of the humanitarian framework or a choice between the “political” and “apolitical” strategies for addressing high levels of violence.

Furthermore, engagement with organized crime groups could present an opportunity for the ICRC to strengthen its neutrality practice. Whereas the ICRC’s humanitarian dialogue tends to be weaker with non-State actors for reasons beyond its control, in many urban violence contexts those limited relationships have been denounced as partly a policy of choice due to the cautiousness of engaging with parties deemed as having primarily criminal or economic motives.⁹⁹ Therefore, by engaging with organized crime groups for the humanitarian imperatives of finding the disappeared, the ICRC’s commitment to enter into dialogue with all relevant parties for humanitarian purposes can be reinforced.

96 Miriam Bradley, “From Armed Conflict to Urban Violence: Transformations in the International Committee of the Red Cross, International Humanitarianism and the Laws of War”, *European Journal of International Relations*, Vol. 26, No. 4, 2020, p. 1062; ICRC, *Urban Violence and the ICRC’s Humanitarian Response*, Geneva, 2016.

97 K. Bergtora Sandvik and K. Hoelscher, above note 84, pp. 175–176.

98 M. Bradley, above note 96, pp. 1076–1078.

99 *Ibid.*, p. 1074.

Conclusion

The situation of disappeared persons in Mexico calls for innovative approaches to address victims' rights and needs, and among them, the question of collaboration with organized crime groups needs greater attention. To this end, this paper has advanced a proposal towards a broader humanitarian understanding of the search for the disappeared through the involvement of the ICRC, based on the shortcomings of the current legal framework and informed by the practices and demands of the field. The potential added value that the ICRC could bring to the Mexican context could be complementary to all of the ongoing justice and prosecutorial efforts and, as such, could reinforce a victim-centred approach to disappearance-related issues.

Additionally, this paper has questioned the traditional conceptions of perpetrator collaboration based on the “carrot and stick” logic. If the human rights field can break through the victim–perpetrator dichotomy and acknowledge that the more systematic violence there is, the more closely linked these two actors are, significant progress in truth-seeking and even justice mechanisms could take place. For this purpose, further interdisciplinary research¹⁰⁰ on the motives, incentives and identities of organized crime groups and perpetrators beyond legal considerations—the roles of religion, ideology, socio-economic status etc. — could be a step forward.

Finally, the proposal that the ICRC should engage with organized crime groups for humanitarian purposes inserts itself within a wider frame of current challenges and questions for the humanitarian field, such as the humanitarianization of urban violence and the unique contributions that the ICRC as a lead humanitarian actor can bring to contemporary violence issues. While the humanitarian approach to disappeared persons has gained considerable attention in post-conflict contexts, further discussion is needed on its possible contributions and pitfalls for situations that escape the dominant paradigms of NIAC classification. If this discussion is to be meaningful, however, it must take place first and foremost with victims and affected communities as active participants with agency.

100 See, for example, the interdisciplinary questions of identity of victims and perpetrators, including “grey zones”, in Undine Kayser-Whande and Stephanie Schell-Faucon, “Transitional Justice and Conflict Transformation in Conversation”, *Politorbis*, No. 50-3, 2010, pp. 102–104.